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No. 82-1489

In the Supreme Court of the United States

October Term, 1982

NL INDUSTRIES, INC.,
Cross-Petitioner,

vs.

C. A. MUNDT,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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The Cross-Respondent C. A. Mundt, respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari, seeking review of the Sixth Circuit opinion in this case. That opinion is not reported but is contained at page A-2 of the appendix to the Cross-Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decisions below interpreting the anti-retaliation provisions of ADEA do not conflict with the decisions of other Courts of Appeal, but merely give effect to the clear mandate of the statute (29 U.S.C. 623(d)).

Section 623(d) of the ADEA (29 U.S.C. 623(d)) provides that "it shall be unlawful for an employer to discriminate against *any of his employees* . . . because such individual has opposed any practice made unlawful by this section, or . . . has made a charge . . . under this chapter." (emphasis supplied).

It is clear from the District Court's findings of fact that Cross-Respondent Mundt was discharged solely for filing a charge of discrimination under ADEA. No other conduct of Cross-Respondent caused his termination. He merely availed himself of the opportunity given to him by the act of filing with the Secretary of Labor (under the former practice) a Notice of Intent to bring suit after 60 days for an alleged violation of ADEA.

Since R. C. Adam, Cross-Petitioner's chief operating officer, had notified Mundt on four occasions that he was being passed over for promotion because of his age, Cross-Respondent certainly had a reasonable basis for filing his Notice with the Secretary of Labor. Under no stretch of the imagination could his action be considered frivolous or without a basis in fact.

The cases from other circuits cited by Cross-Petitioner in support of its position that there should be "an exemption to the coverage of the anti-retaliation provisions when confidential or managerial employees file discrimination claims" support no such position, nor does the statute.

In each of the cited cases, the employee engaged in a course of conduct which was totally inconsistent with his or her obligation to the employer, while in the case at bar, the employee merely filed a Notice with the Labor Department.

In *Smith v. Singer Company*, 650 F.2d 214 (9th Cir. 1981), the complainant was the company's director of equal employment opportunity programs. As such he secretly filed discrimination complaints against his own company with Defense Contracts Administration Services (DCAS) and Equal Employment Opportunity Commission charging widespread discriminatory practices allegedly against other employees, not himself. For three months, while denying to his own company any knowledge of the identity of the complainant (who was himself) he actively participated with DCAS in their investigation of his charges. He conducted secret meetings with selected minority employees to solicit complaints of discrimination. As stated by the District Court, quoted in the opinion, at p. 216:

> He denied knowledge of the identity of the complainant and affirmatively misled Singer as to his own role in the investigation. By doing so, he ceased to perform his duties as a Singer employee in charge of affirmative action, and he commenced work inconsistent with that position. His primary interest necessarily became substantiating his own complaints *against* Singer rather than working *with* Singer to pursue affirmative action and to overcome any real violations which could be found by the EEOC and the DCAS. Yet Smith continued without disclosure as the one person designated to act as a liaison with the DCAS. This was a manifest failure to perform the vital duties which his position required, and this failure justifies Singer's decision to dismiss him. Smith, like any other

employee, cannot be allowed to use an antidiscrimination complaint to excuse a clearly inadequate job performance such as that demonstrated by the admitted facts.

In *Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980) both complainants were black employees at Walter Reed Army Medical Center, one a chemist and one a dictaphone transcriber. Both were made temporary EEO Counselors. Claiming discriminatory employment practices, the two complainants organized a demonstration in the offices of a Colonel in the Food Services Division. The demonstration, to which the media were invited, was in violation of orders. Organizing a prohibited demonstration was deemed by the Court not to be protected conduct under the statute.

In *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) the complainant was a female scientist at her employer's research facility. The District Court found that she made constant complaints to her colleagues, damaging relationships among members of the cell biology group and interfering with laboratory research. She committed acts of disloyalty including assertions that the Foundation was in jeopardy of losing its federal grant money, and challenging the associate director to take sides in her dispute with the director. As stated by the First Circuit, her activities demonstrated that necessary personnel could not work successfully with her; research assistants in her lab were unhappy and quit; senior scientists complained that her behavior impeded their research and the director and assistant director found it impossible to reach any compromise with her. She was a totally disruptive force in the Foundation.

Finally, in *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980) complainant was a black, male Director of Compliance in the Equal Employment Opportunity office. He filed a complaint for a black female employee in violation of prescribed administrative procedures. The Courts found that complainant was fired not in retaliation but because of improper handling of his job, mismanagement of his staff, refusal to comply with terms of his job description and refusal to follow instructions from his superior.

In each of these cases the Courts found either incompetence or disruptive behavior. In each of these cases the employee went far beyond the mere filing of a complaint. In the case at bar the employee merely filed a Notice with the Labor Department and it was *solely* on that basis that he was terminated. There was no evidence that this filing was in any way disruptive or violative of company rules. The employee was fired within 48 hours of the company learning of the filing of his complaint. Accordingly, there was insufficient time in which to determine any effect of the act of filing.

The Cross-Petitioner made a similar argument in the District Court. In response the District Judge held that:

> Notwithstanding the all inclusive language of the statute, defendant contends that in enacting the ADEA Congress never intended to have the judiciary scrutinize corporate employment decisions concerning persons or positions at a company's top policy-making echelon. In short, defendant requests the Court to hold that employment decisions involving persons at the higher levels of the corporate hierarchy are *exempt* from the ADEA.
>
> Significantly, defendant cites no authority in support of its assertion that Plaintiff's First and Second

> Claims for Relief are "beyond the scope of Congressional intendment." Certainly the statutory language does not support that position, and nor does the statute's legislative history. While the Court is not unsympathetic to defendant's concerns in this regard, it is the function of the Congress and not the courts to determine the protective measures to be afforded older workers. If defendant finds the ADEA overbroad in its scope, it may petition Congress for a statutory amendment permitting the exception it now seeks to create by judicial fiat. (Memorandum of September 6, 1978 denying Motion to Dismiss.)

In addressing a similar claim, the Sixth Circuit stated:

> Defendant contended, among other things, that Mundt was not protected by the Age Discrimination in Employment Act because, as a group vice-president, he was "a control—group executive." This contention is overruled because there is no authority to support it and, in view of the purpose of the statute, it has no basis in reason.

We note, as did the District Court, that the statutory prohibitions against retaliation run in favor of "employees", not just lower level employees. Congress has carved out no exception for employees in "sensitive positions." As suggested by the District Court, Cross-Petitioner's complaint should be addressed to the Congress and not to the Courts.

2. The decision below is not inconsistent with opinions of this Court regarding confidential or managerial employees.

Cross-Petitioner next invites this Court to adopt a high level employee exception to ADEA by reference to two cases involving the National Labor Relations Act.

This Court held in *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 288 (1974):

> In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act.

No such factors are present in the ADEA or, even by extension, in Title VII cases. The entire purpose of Title VII and ADEA is to eradicate discrimination. There is no policy reason for excluding upper management. Cases relating to collective bargaining are clearly irrelevant. Different considerations apply.

If Cross-Petitioner were correct, a black vice-president could be fired with impunity for filing a race discrimination complaint. To state the proposition is to show its erroneous basis. No different rules should be applied to age cases.

CONCLUSION

For these reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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